> It is APPA's desire to ensure that whatever legislation is enacted, the diverse needs of the public power communities can be met. Specifically, this means that for those utilities who are likely to lease space over facilities owned by a third party, reasonable access terms, conditions and rates are required. For utilities that will develop and operate communications systems for their own use or to provide conduit but not content service to others, legislation should not saddle them with common carrier obligations. Nor should legislation place obstacles in the path to public ownership of new telecommunications facilities or the public provision of telecommunications services. Indeed, the goals of universal service and vigorous competition can be enhanced if such public ownership and involvement is encouraged.

Testimony of William J. Ray on Behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351, 353-54 (1994) ("Ray Testimony") (Attachment E hereto). APPA also informed Congress of the contributions that its members could make in bringing competition to the telecommunications marketplace, as exemplified by the experience of Glasgow, Kentucky:

> In the 1980s, Glasgow, a community of 13,000 residents, was served -- but not very well -- by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates -- and delivered better service to boot. Big surprise -- the private company decided to drop its rates by roughly 50 percent and improve its service, too.
>
> But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries. Soon this service will allow banking and shopping from home, as well as access to all local government information and databases. We are now providing digital telephone service over our system. That's right -- in Glasgow, everyone

> can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.
>
> The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.

Ray Testimony, at 355-56.

As reflected in the Senate's subsequent report on S.1822, APPA's and UTC's appeals were successful. To promote competition and diversity in the telecommunications industry, the Senate crafted both the key definitions and preemption provisions of the S.1822 so as to encourage municipal involvement in the full spectrum of telecommunications activities.

Specifically, S.1822 defined the term "telecommunications service" as "the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services. . . ." *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 122 (1994) (Attachment F hereto). In explaining this definition, the report used the term "entities" to refer to all persons, whether public or private, that provide may "telecommunications service":

> The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S. 1822 as introduced to ensure that *all entities* providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. . . .

Senate Report on S.1822, at 56 (emphasis added). In the following paragraph, through an example involving electric utilities, the report illustrated the application of this *activity-based* definition of "entity:"

> New subsection (kk) provides a definition of "telecommunications carrier" as *any* provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. *For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses*

> *that capacity, or any other capacity, to provide telecommunications services.* Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. *If an electric utility*, a cable company, or an information services company *also provides telecommunications services, however, it will be considered a telecommunications carrier for those services.*

Id. at 54-55 (emphasis added). The passage quoted above does not distinguish between publicly-owned and privately-owned electric utilities, and on the next page, the report made clear that no such distinction was intended. There, the report turned to Section 230(a)(1), the preemption provision of S.1822, whose key operative terms the 104th Congress would later incorporate *verbatim* into Section 253 (a) of the Telecommunications Act – "[N]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The report clarified that the definitions and preemption provisions of S.1822 were intended to encourage "State or local governments" -- including, but not limited to, those that operated "municipal energy utilities" -- to participate in developing the National Information Infrastructure. Thus, in explaining one of the exceptions to Section 230, the report stated:

> Paragraph (2) also states that States or *local governments* may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a State or *local government* to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned [facilities to] telecommunications carriers.

Senate Report on S. 1822, at 56 (emphasis added). The report then went on to give an example that explicitly mentioned "municipal energy utilities":

> For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such a municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that *State or local governments may sell or lease capacity* on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a "telecom-

munications service," the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.

Senate Report on S.1822, at 56 (emphasis added).

Taken together, and especially when viewed in the context of the issues that APPA and UTC had raised with Congress, these passages demonstrate that (1) Congress intended that the term "entities" cover *all* public and private providers of "telecommunications service," including electric utilities; (2) Congress understood "electric utilities" to include "municipal energy utilities;" and (3) Congress intended that, if municipalities and municipal electric utilities chose to cross the line from leasing facilities to providing telecommunications services themselves, they would be subject to the same obligations and benefits as the Act extended to any other carrier of telecommunications service. The obligations included, among others, the duty to contribute funds to the universal service program. The benefits included protection from state barriers to entry.

Moreover, municipal electric utilities generally derive their authority through, and operate as departments or offices of, municipal governments. Protecting municipalities, as such, from state barriers to entry was therefore necessary to fulfill Congress's unquestionable intent to encourage and enable most municipal electric utilities to participate in the development of the National Information Infrastructure.

The 103rd Congress ended without passage of new telecommunications legislation. Congress still had much to do in drafting other areas of law, and significant issues remained to be resolved concerning the effect of the Act's preemption provisions on the ability of local governments to manage their rights-of-way. As will be seen in the next section, however, Congress's work on what was to become Section 253(a) of the Telecommunications Act was essentially done.

B. The 104th Congress

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. As the Supreme Court has observed, the Act "was an unusually important legislative enactment." *Reno v. ACLU*, 117 S.Ct. 1329, 1338 (1997). The new law, the Commission has said, "fundamentally changes telecommunications regulation" from a paradigm that encouraged

monopolies to one that seeks to foster robust competition in all telecommunications markets. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶1 (rel. August 8, 1996) ("*Interconnection Order*"). In the *Interconnection Order*, the Commission furnished the following succinct description of the goals of Act and Congress's vision in enacting it:

> In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.
>
> . . .
>
> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets.* The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.*

Interconnection Order, ¶¶ 3, 4 (emphasis added).

In developing the Act, Congress recognized that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbent local exchange carriers. Thus, according to the Commission, Congress "armed" the Commission with "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Texas Order*, ¶ 2. Recognizing that incumbents could thwart the national policies of the Act at the state and local level, where they have historically had enormous political influence, Congress expressly prohibited state and local governments from impairing the ability of any potential provider to enter any telecommunications market:

SECTION 253 – REMOVAL OF BARRIERS TO ENTRY

> (a) IN GENERAL - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide *any interstate or intrastate telecommunications service*.

47 U.S.C. Section 253(a) (emphasis added).

As reflected in a colloquy on the Senate floor between Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, the 104th Congress understood that Section 253(a) originated in S.1822 and had "no problem" with its scope. 141 Cong. Rec. at S8174 (June 12, 1995) (Attachment G hereto). Thus, the 104th Congress incorporated the key operative terms of the preemption provision of S.1822 *verbatim* into Section 253(a) of the 1996 Act. There was no need for elaborate legislative history, but what there was corroborated that the 104th Congress understood and intended that the term "any entity" apply to municipalities and municipal electric utilities.

In the Joint Explanatory Statement of the Committee of Conference, the conferees noted that electric utilities may "choose" to provide telecommunications services, and they made clear that Congress intended that such choices be unencumbered by state or local barriers to entry:

> New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996) (emphasis added) (Attachment H hereto).

Referring to this passage, its author, Congressman Dan Schaefer (R-CO) subsequently confirmed in a letter to former FCC Chairman Reed Hundt that "Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition," that "any prohibition on their provision of this service should be preempted," and

that the Commission "must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control*" (Attachment I hereto) (emphasis added). In reply, Chairman Hundt assured Congressman Schaefer that the Commission's staff would place his letter in the record of the Texas case and consider it carefully (Attachment J hereto). The letter was not included in the administrative record, nor was it even mentioned in the Commission decision.[7]

In another letter to Chairman Hundt (Attachment M hereto), Senator Bob Kerrey (D-NE) was even more emphatic about Congress's intent in enacting Section 253:

> Anti-competitive laws passed by state and local governments pose a real threat to the development of competition in local telecommunications markets. In the wake of the Telecommunications Act, several states have passed legislation that prohibits or significantly impairs the ability of publicly-owned utilities to provide telecommunications services themselves or to make their facilities available to other potential providers of telecommunications services. I am concerned that these actions are significantly delaying consumers' ability to exercise their economic power by choosing between local telecommunications carriers.
>
> Congress created Section 253 of the Telecommunications Act to address this problem by granting the Federal Communications Commission (FCC) authority to preempt state and local legal requirements that pose a barrier to entry into telecommunications by "any entity." *The law makes no distinction among types of entities or forms of ownership.* Section 253 states, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *In using the term "any entity," Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.*

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[7] Compare the Commission's initial Certified List of Items in the Record, which it filed in the Abilene case before the D.C. Circuit on December 11, 1997, with its supplemental list, which it filed on May 7, 1998, at the request of counsel for the petitioners (Attachments K and L hereto).

Id. (emphasis added). Senator Kerrey's letter received the same treatment as Congressman Schaefer's -- it was never included in the administrative record of the Texas case, nor was it mentioned in the decision.

II. SECTION 703 OF THE TELECOMMUNICATIONS ACT

While it was considering Section 253, Congress was also working on major amendments to the pole-attachment requirements in Section 224 of the Communications Act of 1934. The resulting measure -- Section 703 of the Telecommunications Act -- is the exception that proves the rule. In that provision, Congress showed that it knows how to distinguish "political subdivisions" and "instrumentalities" of a state from other entities when it wants to do so.

In Section 703(1), Congress amended the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." In Section 703(7), Congress imposed upon all firms meeting the new definition of "utility" an obligation to "provide a cable television system or any telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Elsewhere, Section 703 authorized the Commission or the states to regulate the rates, terms and conditions for pole attachments, prescribed timetables for issuing regulations to implement Section 703, and specified some of the key requirements that the Commission's regulations must contain.

At the same time, Congress elected to preserve and reaffirm the exemption that local governments have traditionally had from federal pole-attachment requirements. Congress did so by leaving intact Section 224(a)(1) of the 1934 Act. Thus, solely for purposes of the pole attachment requirements of Section 224,[8] Section 224(a)(1) states that the term "utility" does not

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[8] The phrase "[a]s used in this section" in Section 224(a) restricts the definitions in the subsections that follow to the pole-attachment requirements of Section 224.

include "any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." Section 224(a)(3), in turn, define[s] the term "State" as "any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof*" (emphasis added).

Notably, although it could easily have done so, Congress did not similarly limit the term "entity" in Section 253(a).

III. THE TEXAS ORDER

On October 1, 1997, after ICG withdrew its petition, the Commission released its *Texas Order*, which the Commission expressly limited to municipalities. *Texas Order*, ¶ 179. The Commission's key findings appeared in the following passages in the *Order*:

- "We do not preempt the enforcement of PURA95 section 3.251(d) because we conclude that the city of Abilene is not an 'entity' separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. We also find that preempting the enforcement of PURA95 section 3.251(d) would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Texas Order*, ¶ 179.

- "PURA95 section 3.251(d), which precludes a municipality or municipal electric system from providing telecommunications services, is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions. In this case, the Texas legislature defined those contours by denying its municipalities the authority to engage in certain activities." *Texas Order*, ¶ 180.

- "The scope of the authority delegated by a state to its political subdivisions is an area that traditionally has been within the purview of the states. . . . With regard to such fundamental state decisions, including, in our view, the delegation of power by a state to its political subdivisions, therefore, *Ashcroft* suggests that states retain substantial sovereign powers "'with which Congress does not readily interfere' absent a clear indication of intent." *Texas Order*, ¶ 181.

- Although entry into telecommunications markets by municipalities may enhance the potential for competitive local exchange services in such communities, as some parties point out, this possible pro-competitive effect does not, in our view, warrant the conclusion that section 253(a) prevents states from restricting the

activities of their own political subdivisions, absent some indication in the statute or its legislative history that Congress intended such a result. *Texas Order*, ¶ 187.

- "Despite our decision not to preempt, we encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in PURA95. Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services. At the same time, we recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition." *Texas Order*, ¶ 190.

IV. SUBSEQUENT COMMISSION INTERPRETATIONS OF "ANY" AND "ENTITY"

The Commission's interpretation of the term "any entity" in the *Texas Order* not only runs counter to Congress's understanding of that term, but it also clashes with the Commission's own interpretations of the terms "any" and "entity" in other contexts. Three examples follow.

First, in its universal service orders and forms, the Commission has consistently considered municipalities and municipal electric utilities to be "entities" that must make universal service contributions if they provide services that meet the Act's definitions of "telecommunications service" or "interstate telecommunications." For example, in its first report and order on universal service, the Commission stated that state and local government "entities" that enter into cost-sharing arrangements to construct and operate private telecommunications networks solely for the purpose of serving their own needs would not qualify as "telecommunications carrier[s]" because such arrangements would not involve offering services "directly to the public." Nor would state and local government entities be "other providers of interstate telecommunications" in these arrangements, as they would simply act as a "consortium of customers." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶¶ 784, 800 (rel. May 8, 1997) ("*Universal Service Order*"). If, however, a state or local government entity acted as "a lead participant [that] owned and operated its own telecommunications network and received monetary payments for service from other participants,

the lead participant would be a provider of telecommunications and, if it provided interstate telecommunications, would be included within the group that we require to contribute to the support mechanisms, subject to the *de minimis* exception." *Id.*, ¶ 800; *see also* instructions to FCC Form 457.

Second, in its most recent major report and order on pole attachments, the Commission had occasion to interpret both the term "any" and the term "entities." The Commission's interpretations contradict its interpretation of these terms in the *Texas Order*.

As to the term "any," the Commission declined to distinguish between pole attachments by wire and wireless providers of telecommunications service, reasoning as follows:

> Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as "any attachment by a cable television system," but now states that a pole attachment is "any attachment by a cable television system *or provider of telecommunications service*." [Emphasis in original.] Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for "any telecommunications carrier... to provide any telecommunications service." In both sections, *the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments*. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as "any provider of telecommunications services." Section 3(46) states that telecommunications services is the "offering of telecommunications for a fee directly to the public...regardless of the facilities used," and Section 3(43) specifies telecommunications to be "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received." *The use of "any" in Section 3(44) precludes limiting telecommunications carriers only to wireline providers.*

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket

No. 97-151, Report and Order, FCC 98-20, ¶ 40 (rel. February 6, 1998) (emphasis added) (footnotes omitted) ("*Pole Attachment Order*").[9]

Later in the *Pole Attachment Order*, the Commission not only applied the term "entities" to government agencies, but it also acknowledged that such "entities" can be expected to provide telecommunications or cable services:

> The *Notice* proposed that *government entities* with attachments, like other entities present on the utility pole, be counted as entities on the pole for purposes of allocating the costs of unusable space....
>
> To the extent that government agencies provide cable or telecommunications service, we affirm our proposal that they be included in the count of attaching entities for purposes of allocating the cost of unusable space. We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. We conclude that, *where a government agency's attachment is used to provide cable or telecommunications service*, the government attachment can accurately be described as a "pole attachment" within the meaning of Section 224(a)(4) of the 1996 Act.

Pole Attachment Order, ¶¶ 52, 54 (emphasis added).

Third, the Commission has routinely considered municipalities to be "entities" when evaluating the effects of the Commission's new rules and regulations. For example, in the *Pole Attachment Order* the Commission found:

> The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000." *There are 85,006 governmental entities in the United States. This number includes such entities as states, counties, cities, utility districts and school districts.* We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments

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[9] In citing this order, APPA and UTC express no opinion on the correctness of the Commission's interpretation of Section 224. Rather, petitioners merely note that the Commission has generally interpreted the term "any" in its broadest sense, in sharp contrast with its interpretation of that term in the context of Section 253.

> pursuant to Section 224(c)(1). *Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states.* Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

Pole Attachment Order, ¶ 165 (emphasis added). Similar language appears in the *Universal Service Order*, ¶ 923.

In summary, except for its departures in the *Texas Opinion* and the *Alarm Industry* case -- which the D.C. Circuit overturned -- the Commission has routinely afforded the terms "any" and "entities" their plain, ordinary, expansive meanings.

V. THE ANTI-COMPETITIVE PURPOSES AND EFFECTS OF HB 620

On August 28, 1997, the 89th General Assembly of Missouri enacted House Bill 620 to repeal and replace Section 392.410 of the Revised Statutes of Missouri (Attachment N hereto). The portion of the new Section 392.410 that applies to municipalities and municipal electric utilities reads as follows:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
>
> (1) For its own use;
> (2) For 911, E-911 or other emergency services;
> (3) For medical or educational purposes;
> (4) To students by an educational institution;
> (5) Or Internet type services.
>
> The provisions of this subsection shall expire on August 28, 2002.

Section 392.410(7).

With certain exceptions, providers of telecommunications services are generally required to obtain certificates of service authority. HB 620 thus prohibits municipalities and municipal

electric utilities either from providing such services themselves or from making their facilities available to other persons for use in competing with incumbent providers.

HB 620 is no mere abstraction. There is virtually no competition in local markets in Missouri today, and HB 620 was intended to keep things that way. According to a study of Southwestern Bell's own data conducted by the Missouri Telecommunications Coalition, Southwestern Bell's competitors provide less than one-half of one percent of the access lines in Missouri, and Southwestern Bell services all but a total of 435 residential lines in the state (Attachment O hereto). Unless the Commission preempts HB 620, these statistics will not change appreciably any time soon.

The City of Springfield's experience furnishes a representative example of the harmful effects of HB 620. In 1971, Missouri amended its constitution to give its cities broad "home rule" powers:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Missouri Constitution, Article 6, § 19(a) (Attachment P hereto).

In its charter, the City of Springfield established an eleven-member Board of Public Utilities to control and operate all "public utilities" that the City owned or might acquire in the future. *City Charter*, Art. XVI, § 16.2(1) (Attachment Q hereto). The charter defined the term "public utilities" as follows:

> The term "public utilities" by way of description, but not as a limitation, shall include electric systems (and appurtenant steam heating apparatus and piping), gas systems, water systems, transit systems, and *public communications systems* (including all plants, apparatus, equipment, and distribution facilities related to any such system), or any other service or facility commonly considered to be a public utility or so declared to be by any statute, ordinance or court decision.

City Charter, Art. XVI, § 16.1 (emphasis added). The charter gave the Board broad powers to "do all things needful for the successful operation of said utilities. . . . " *Id.*, § 16.7. The charter

also ensured skilled, responsible, non-partisan management of the City's public utilities by requiring all members of the Board to have "business or professional experience," by precluding more than six members of any political party from serving on the Board at the same time, and by prohibiting members from engaging directly or indirectly in political activities. *Id.*, §§ 16.2(4), 16.5. Furthermore, the charter withheld authority from the Board or its members to participate in franchising, licensing or otherwise regulating non-public utilities. *Charter*, Articles XVI-XVIII.

In 1988, City Utilities commenced construction of a telecommunications system that now includes nearly 200 miles of fiber optic cable and associated electronics. The original purpose of the system was to serve the communications needs of the City's electric utility. In 1992, City Utilities also began to link together the buildings of other city agencies, including City Hall, the Health Department, the Parks Department, the headquarters of the Police and Fire Departments, the municipal court and the City Service Center. City Utilities not only made it possible for the City to obtain a wide range of data communications and telecommunications services that it would otherwise have been unable to afford, but City Utilities also enabled the City to develop sophisticated new technology-based approaches that revolutionized its handling of arraignments, traffic control, sewage treatment, environmental monitoring and control, and numerous other functions.

In the last two years, many public and private entities, frustrated by Southwestern Bell's high prices and limited service offerings in Springfield, have sought access to the City's system. The City has no desire to become a telephone or cable company itself, but it does want to ensure that the residents and businesses of Springfield will have prompt and affordable access to the full benefits of the Information Age. These benefits include economic growth, educational opportunity and quality of life. HB 620 precludes the City from providing telecommunications services itself, but it would even bar the City from making its system available to other new market entrants that would be potential competitors of the incumbent monopolist. HB 620 has the same effect on many other municipalities throughout the State.

Furthermore, for the 63 municipal electric utilities that the Missouri Municipals represent, including City Utilities of Springfield, this is a time of profound change as the electric power industry undergoes restructuring and deregulation. Congress and many states are now struggling to develop approaches that would preserve the competitive balance in the electric power industry from which the Nation has benefited greatly for decades.[10] With investor-owned and cooperatively-owned electric utilities free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers "one-stop shopping" for energy, communications and other services, HB 620 would put municipal electric utilities at a severe competitive disadvantage.[11]

Although promoting competition in the electric power industry is not a direct responsibility of the Commission, it should be aware of the significant effect that its decisions could have in that area.

ARGUMENT

I. THE TERM "ANY ENTITY" IN SECTION 253(a) OF THE TELECOMMUNICATIONS ACT APPLIES TO MUNICIPALITIES AND MUNICIPAL ELECTRIC UTILITIES

In the Texas case, the Commission recognized that "the ultimate question underlying any preemption analysis is 'whether Congress intended that federal regulation supersede state law,'"

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10 Congress's concern about preserving healthy competition in the electric power industry is reflected in the statements of various members of Congress in a hearing on the role of public power in a competitive environment. S. Rep. No. 105-25, Part I, 105th Cong. 1st Sess. 85-92 (1997) (Attachment R hereto).

11 Section 103 of the Telecommunications Act and the Commission's implementing orders and regulations, 47 C.F.R. § 1.4000 et seq., 61 Fed. Reg. 52887 (October 9, 1996), have effectively eliminated the constraints that the Public Utility Company Holding Company Act of 1935 had previously imposed on the ability of the major investor-owned electric utilities to provide telecommunications services. At the same time, rural electric cooperatives, as private rather than public entities, are not constrained by the Commission's decision in the Texas case.

Texas Order, ¶ 51, quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). That is so even with respect to exercises of "fundamental" or "traditional" state powers of the kind "'with which Congress does not readily interfere' absent a clear indication of intent." *Texas Order*, ¶ 181, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, assuming (without conceding) that HB 620 is the product of such an exercise, this case does not present substantial questions of "States' rights," but boils down to whether Congress manifested in the language, structure, legislative history and purposes of the Telecommunications Act, an intent to protect municipalities and municipal electric utilities from state and local barriers to entry.

A. The Relevant Standards

1. Preemption Analysis

Article VI, Clause 2, of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, since the Supreme Court's decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that any state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Preemption analysis "[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "[t]he purpose of Congress is the ultimate touchstone" in determining the effect of federal law on state legislation. *Malone v. White Motor Corp.*, 345 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

As the Commission noted in the Texas case, quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 368-69 (citations omitted):

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal

> law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Texas Order, ¶ 33. As shown below, these principles require preemption of HB 620.

2. Standards for Determining the "Plain" Meaning of a Statute

In ascertaining whether Congress intended to preempt a state law, the starting point is "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Where Congress makes express provision for the preemptive effect of its handiwork, the inquiry is an "easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Indeed,

> [w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2618 (1992).

"When a federal statute unambiguously forbids the States to impose a particular kind of [law], courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a [law] is preempted." *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). But if a statute itself does not completely answer the question, agencies and courts must evaluate all other traditional indicia of congressional intent. *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C. Cir. 1997).

There was a time when uncertainties existed about whether Congress could preempt state laws dealing with "fundamental" or "traditional" state functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them.

Id. at 546-47. The proper place to look, the Supreme Court concluded, is the federal political process:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 555.

In *Ashcroft*, the Supreme Court set forth the relevant standard for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" state functions -- Congress must have made a "plain statement" to that effect. *Id.* at 467. The statement need not be express, but Congress's intent must be "plain to anyone reading the Act." *Id.* ("This does not mean that the Act must mention [the preempted issue] explicitly, ... But it must be plain to anyone reading the Act that it covers [that issue]" (citations omitted).

Nor need Congress enumerate each item, issue or person that it wishes to cover, as broad terms such as "any" and "all" are sufficient to convey Congress's plain meaning. For example, in *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir. 1997), a disabled prisoner claimed that the federal Americans With Disabilities Act ("ADA") compelled the Commonwealth of Pennsylvania to include him in a "boot camp" program operated by one of its correctional facilities. The Commonwealth replied that operating a prison system was a "core" state function, that the ADA did not expressly cover prisons, and that *Ashcroft* therefore precluded a finding that Congress intended to preempt state authority in this area. The Third Circuit disagreed:

> To be sure, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 461, 111 S.Ct. 2395, 2400, 2401, 115 L.Ed.2d 410 (1991) (internal quotation marks and citations omitted). This requirement, however, is a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470, 111 S.Ct. at 2406. It is not a warrant to disregard clearly expressed congressional intent.
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> *Torcasio [v. Murray*, 57 F.3d 1340 (4th Cir. 1995)]'s statement that Congress must specifically identify state or local prisons in the statutory text, if it wishes to regulate them, was expressly disavowed by the Supreme Court in *Gregory*. *See id.* at 467, 111 S.Ct. at 2404 ("This does not mean that the Act must mention judges explicitly."). Congress need only make the scope of a statute "plain." *Id.* And Congress has done that here. Both Section 504 and Title II speak unambiguously of their application to state and local governments and to "any" or "all" of their operations. *In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms "any" and "all."*

Yeskey, 118 F.3d at 173 (emphasis added). The Supreme Court has recently affirmed that decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 66 USLW 4481, 1998 WL 309065 (June 15, 1998).

Furthermore, in determining whether the "plain" meaning of a statute requires preemption, it is essential to examine the statute in its entirety. One must consider "not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part. *Illinois Public Telecommunications Ass'n v. Federal Communications Commission*, 17 F.3d 555, 568 (D.C. Cir. 1997), citing *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990). In *Bell Atlantic Telephone Companies v. Federal Communications Comm.*, 131 F.3d 1044 (D.C. Cir. 1997), the D.C. Circuit Court succinctly summarized the interpretative process as follows:

> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), governs review of agency interpretation of a statute which the agency administers. Under the first step of *Chevron*, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2782 n. 9). The

> traditional tools include examination of the statute's text, legislative history, and structure, *see Southern California Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997); as well as its purpose, *see First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996). *This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute*. If this search yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate.

Id. at 1047 (emphasis added). Application of this process yields compelling proof that Congress intended that Section 253 apply to state barriers to entry by both municipalities and municipal electric utilities.

B. The Language, Structure, Legislative History and Purposes of the Telecommunications Act Require Preemption of HB 620.

1. Language and Structure

The term "entity" is not defined in Section 253(a) of the Telecommunications Act or in the general definitions in 47 U.S.C. § 153 that apply throughout the Act unless expressly overridden by section-specific definitions. The term "entity" must therefore be given its ordinary meaning. *Morales*, 504 U.S. at 383; *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.")

Standing alone, the term "entity" is itself broad enough to include municipalities and municipal electric utilities. As the D.C. Circuit recently found in *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066 (D.C. Cir. 1997),[12] definitions of "entity" found in standard non-technical dictionaries include (1) "something that exists as a particular and discrete unit," (2) a "functional constituent of a whole" and (3) "the broadest of all

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[12] In the *Alarm Industry* case, the D.C. Circuit rejected an unduly restrictive Commission interpretation of the term "entity" in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the Commission's interpretation any deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Alarm Industry*, 131 F.3d at 1069.

definitions which relate to bodies or units." *Id.* at 1069. Municipalities and municipal electric utilities meet all of these definitions. With home-rule authority to manage their own affairs -- subject to *lawful* state legislation -- they operate as "particular and discrete unit[s]." At the very least, "political subdivisions" of a state operate as "functional constituent[s] of a whole."

It is not appropriate, however, to view the term "entity" in isolation. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of the statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citations and inner quotations omitted). In the oft-quoted words of Judge Learned Hand, "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.). Likewise, the D.C. Circuit recently observed that "textual analysis is a language game played on a field known as 'context.' The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." *Bell Atlantic*, 131 F.3d at 1047.

In Section 253(a), the term "entity" is preceded by the word "any" and followed by the phrase "to provide any interstate or intrastate telecommunications service." Both modifiers furnish valuable information about Congress's intent. As to the term "any," Congress could not have used a more expansive adjective. As explained in *Corpus Juris Secundum*:

> The word "any" is frequently used in a broad distributive sense, with what is described as its natural, ordinary, or usual signification. In this, its ordinary sense, it is a word which is broad and general, and comprehensive, and broadly inclusive, and all embracing. As so used, the term has a most comprehensive meaning, and a plural signification, implying unlimited choice as to the particular unit.

3A *C.J.S.* at 903. "Unless modified by the context, the term includes all persons and things referred to indiscriminately; it negatives the idea of exclusion." *Id.* "Any" is further defined as meaning indiscriminate, without limitation, or restriction, 3A *C.J.S.* at 905, and has been held to

mean "any and all," "all or every," "each," "each one of all," or "every." *Id.* at 904. *Webster's* similarly defines the word "any" as:

> One indifferently out of a number; one (or, as pl. some) indiscriminately of whatever kind; specif.: a. Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select;... b. indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exception .

Webster's New International Dictionary 121 (2d ed. 1957).

As the Supreme Court has recognized, when Congress prefaces a definition with the term "any," this "undercuts the attempt to impose [a] narrowing construction." *Salinas v. U.S.*, 118 S.Ct. 469, 473, citing *United States v. James*, 478 U.S. 597, 604-605 and 605 n.5 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947). Similarly, the Commission has itself recently held in the *Pole Attachment Order* that when Congress uses the term "any" in the Telecommunications Act, its intent is to deny the Commission authority to draw distinctions Congress did not make itself. *Pole Attachment Order*, ¶ 40. These considerations have particular force here.

To be sure, even the term "any" can have a limited meaning in some contexts, as the D.C. Circuit held in the *Bell Atlantic* case, 131 F.3d at 1047. But nothing in the Telecommunications Act suggests that Congress intended to give that term anything but its broadest possible meaning in Section 253(a). Rather, as in *Trainman*, "[t]here is not a word which would warrant limiting this reference. . . ." 331 U.S. at 529.

The juxtaposition of "entity" and "telecommunications service" in Section 253(a) reinforces the foregoing conclusion. As the Commission reaffirmed its recent report to Congress on the key definitions in the Telecommunications Act,[13] the term "telecommunications service" is

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13 *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, at ¶ 32 (rel. April 10, 1998).

the primary structural device through which Congress allocated various burdens and incentives to achieve its purposes under the Act. For example, providers of telecommunications service must comply with the interconnection requirements imposed by Section 251, with the universal service contribution requirements imposed by Section 254, with the common carrier duties imposed by Title II of the Communications Act, and the consumer privacy requirements imposed by Section 222. At the same time, the Act encourages persons to provide telecommunications service by affording them nondiscriminatory access to poles, ducts, conduits and rights of way under Section 224, opportunities for interconnection under Section 251, universal service subsidies under Section 254, and protection from state barriers and local barriers to entry under Section 253(a). None of these provisions distinguishes between public and private providers of telecommunications service. Indeed, it would be unreasonable to suppose that Congress intended to subject public entities to the burdens of the Act without also affording them the corresponding benefits.

Second, as noted above, Congress carefully distinguished privately-owned entities from "political subdivisions" or "instrumentalities" of a state for the purposes of the pole-attachment provisions of Section 224 of the Act and *at the same time* conspicuously failed to do so for the purposes of Section 253(a). The Commission itself underscored the significance of such a distinction. For example, in its recent consumer privacy order, the Commission noted that "[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), *quoting Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996). The Commission should draw the same conclusion here.

Third, as the Commission observed in the *Texas Order*, ¶ 2, Section 253 was part of Congress's careful scheme of allocating responsibilities among the federal government and the states. On the one hand, in Sections 251, 252 and 254, Congress sought to foster a partnership among the federal government and the states in implementing the local competition and universal service goals of the Act. The Commission, the states, affected parties and the courts may disagree over the precise terms of the partnership, but all concerned agree that Sections 251, 252 and 254 provide for some form of joint responsibility among the federal government and the states.

In contrast, in Section 253(a) Congress flatly prohibited states from erecting barriers to entry, and in Section 253(d) Congress *required* the Commission to preempt any such measures that the state could not show to be "necessary" to achieve one or more of the four public purposes expressly set forth in Section 253(b). Given the specificity and clarity with which Congress defined the states' role in Section 253, Congress would surely have inserted the word "private" between "any" and "entity" in Section 253(a) if that had been its intent. By attributing such intent to Congress, the Commission acted beyond its authority and usurped Congress's prerogative to make policy decisions. *See Trainmen*, 331 U.S. at 530 ("When the framers have used language which covers [the subject in issue], we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way.")

2. The Legislative History and Purposes of the Act

The legislative history of Section 253(a) and the Commission's own statements about the purposes of the Act further confirm that Congress intended to protect municipalities and municipal electric utilities from state barriers to entry. As discussed, the legislative history of Section 253(a), including the history of its precursor in S.1822, makes clear that Congress understood that municipalities and municipal electric utilities could help provide or facilitate competition to telecommunications markets, especially in rural areas; that Congress intended to encourage municipalities and municipal electric utilities to play these roles in their communities; and that Congress manifested this intent through the definitions and preemption provisions of the Act. Indeed, the legislative history *expressly* confirms these points.